No. 12,394

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRTLE CANON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

I. NO FINDING WAS MADE BY THE TRIAL COURT ON THE ISSUE OF NEGLIGENCE.

Much of appellee's brief is devoted to the assertion that plaintiff failed to prove negligence on the part of defendant's employees or agents. The findings of fact made by Judge Goodman expressly omit determination of this issue. (Findings XVIII to XXIV inclusive, Record pp. 21-23, particularly Finding XXIV at p. 23.)

In passing, however, it may be noted that the rule is that on a motion to dismiss or for nonsuit plaintiff's evidence must be accepted as true, and plaintiff is entitled to the most favorable inferences deducible from the evidence.

Thompson v. Irrigation District, 227 Fed. 560;

Hotel Woodward Co. v. Ford Motor Co., 258 Fed. 322;

Boal v. Electric Storage Battery Co., 98 Fed. (2d) 815.

In the light of this rule defendant's motion to dismiss could not be sustained in the face of the testimony given by Dr. Esnard. (Record pp. 72-80.)

II. THE DOCTORS AND NURSES WHO TREATED PLAINTIFF WERE ACTING WITHIN THE SCOPE OF THEIR EMPLOYMENT.

Reference is made to the arguments advanced in appellant's opening brief, pages 6-9.

The position of appellant receives further supprt from the testimony at pages 47-48 in the Record, in connection with which this Court should have in mind the principle of law enunciated in the *Restatement of Agency,* Section 236:

> "An act may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person."

Appellant desires to supplement the cases of *Stansell v. Safeway Stores,* 44 Cal. App. (2d) 822, and *Andrews v. Seidner,* 49 Cal. App. (2d) 427, cited as authority for the distinction between authority and "scope of employment", with the following cases:

Lane v. Safeway Store, Inc., 33 Cal. App. (2d) 169 at pp. 172-173,

and

McChristian v. Popkin, 75 Cal. App. (2d) 249, at pp. 254, 255.

On this point appellee relies on *Rahmel v. Lehndorff,* 142 Cal. 681, but the statement in the *Rahmel* case that the wrongful act must be one which the servant is empowered under certain circumstances to do is expressly limited and repudiated in *Ruppe v. City of Los Angeles,* 186 Cal. 400 at p. 402.

In support of its arguments on this point appellee cites several cases at pp. 16 and 17 of its brief but examination of these cases discloses that they all deal with "the power of an agent to bind the federal government to a *contract,* a field of agency law in which 'authority' is the key question." (Appellant's Opening Brief, p. 8, footnote 2.)

Appellee asserts (Appellee's Reply Brief, pp. 7 and 11) that there is nothing in the record indicating that the Commanding Officer, Col. Smith, gave his permission to the admission of plaintiff to the De Witt Hospital. The record is to the contrary. (Appellant's Opening Brief, p. 3; Record, p. 49; Plaintiff's Exhibit 3, p. 1.)

III. THE ADMISSION OF PLAINTIFF TO DE WITT HOSPITAL WAS AUTHORIZED BY THE APPLICABLE ARMY REGULATIONS.

It is not admitted as stated in appellee's reply brief, page 14, that "the employee in this case had no authority to admit appellant". Point V and the argu-

ment thereunder of appellant's opening brief are devoted to the argument to the contrary.

In appellant's opening brief the correct citation for A.R. 40-590, Par. 6-b(13) was omitted. The correct citation is:

9 Fed. Reg. p. 11571; Title 10, Chapter VII, Code of Federal Regulations, Section 707.15 (b) (13).

Appellant's opening brief cited at page 17 as likewise pertinent to this point, Section 77.2 of Title 10, Code of Federal Regulations. The correct citation for this section is Title 10, *Chapter VII,* Code of Federal Regulations, Section 77.2.

This latter section was in effect upon the date of appellant's admission to De Witt Hospital in June, 1945. This section was enacted as Par. 2, A.R. 40-505, September 1, 1942, as amended March 2, 1943; 7 F.R. 7583, 8 F.R. 3281.

IV. THE FEDERAL GOVERNMENT OWED PLAINTIFF THE DUTY OF CAREFUL TREATMENT ONCE HER TREATMENT HAD BEEN UNDERTAKEN AT DE WITT HOSPITAL.

The duty of care owed plaintiff at the DeWitt Hospital is to be measured by her status therein. Actually, plaintiff was a "licensee" or a "business visitor" depending upon whether or not the classification made by the California cases or the Restatement, Torts, is accepted. See *Boucher v. American Bridge Co.,* 95 A.C.A. 769, Jan. 20, 1950, at p. 777.

However, in appellant's opening brief for the purpose of argument we assumed the extreme that she could be regarded as a trespasser and pointed out that

even upon this assumption the defendant had failed in its duty to appellant. (Appellant's Opening Brief, pp. 13-15.) Appellee asserts (Appellee's Reply Brief, p. 19) that the rule in *Sessions v. Southern Pacific,* 159 Cal. 599, was not expressly overruled in the later case of *Oettinger v. Stewart,* 24 Cal. (2d) 133. Since the filing of our opening brief the District Court of Appeal has obliged appellee by expressly overruling the *Sessions* case in *Fernandez v. Consolidated Fisheries, Inc.,* 98 A.C.A. 89 at p. 95. The *Fernandez* case was decided June 13, 1950, and a hearing was denied by the Supreme Court August 10, 1950. That decision establishes it to be the law of the State of California that the duty of ordinary care established by Section 1714 of the California Civil Code applies to invitees, licensees and trespassers.

V. DEFENDANTS ARE NOT EXCUSED BY THE EXCEPTION IN THE FEDERAL TORT CLAIMS ACT FOR A DISCRETIONARY FUNCTION OR DUTY.

Appellee argues that the government is not liable in this case for the reason that it was exercising a discretionary function within the exception in Section 421 of the Federal Tort Claims Act cited in *Denny v. U.S.,* 171 Fed. (2d) 365.

The answer to this contention is two-fold: As pointed out in our opening brief (p. 6, footnote 1) plaintiff's claim rests upon the negligent treatment of the doctors and nurses who treated her while they were acting within the scope of their employment, *and not upon the negligence of Col. Smith, the Command-*

ing Officer of the hospital in admitting plaintiff. This is in contrast to the situation in the *Denny* case where the claim for liability was predicated upon failure to admit plaintiff to an Army hospital as a breach of a duty upon the part of the admitting officers, found to be discretionary by the Court in that case.

Second, the language of A.R. 40-590, and of Section 77.2, Title 10, Chapter 7, C.F.R., indicates that the duty to admit in the proper circumstances is mandatory not discretionary.

VI. IT IS NOT TRUE THAT "APPELLANT BEING A FEDERAL EMPLOYEE HER EXCLUSIVE REMEDY WAS IN THE FEDERAL EMPLOYEES COMPENSATION ACT."

Far from supporting appellee's position on this point the cases cited by appellee are to the contrary. Thus in *Parr v. U. S.*, 172 Fed. (2d) 462, it was expressly held that when the Federal Tort Claims Act was enacted the plaintiff in that case had two remedies for the same wrong. The same holding was made regarding the Federal Control Act of March 21, 1918 (40 Stat. 451) as it related to the Federal Compensation Act (39 Stat. 742) in *Dahn v. Davis,* 258 U.S. 421 at p. 428.

In both of those cases it was held that the plaintiff had elected to accept the benefits in the Federal Compensation Act and was therefore precluded from pursuing the alternative available remedy. In this case there is not the slightest evidence of an election on the part of plaintiff to accept the benefits of the Federal

Compensation Act; in distinction to the facts in the two cases above plaintiff made no claims for compensation and accepted no benefits payable under that Act. *An election was furthermore impossible, because the Federal Tort Claims Act was not effective until August 2, 1946, while plaintiff was admitted to the hospital in June, 1945.*

Nothing in either the Federal Compensation Act nor the Federal Tort Claims Act, where numerous other exceptions are set forth in Section 421, indicates that either is intended to be an exclusive remedy. Under the cases cited by appellee, therefore, in the absence of an election, plaintiff had a right to proceed under the Federal Tort Claims Act.

The decision in *Jefferson v. U. S.*, 77 Fed. Sup. 706 (Appellee's Brief, p. 15), is expressly limited to consideration of the rights of an enlisted man in the United States Army.

CONCLUSION.

The judgment of the District Court should be reversed and the case remanded for a new trial.

Dated, San Francisco, California,
August 16, 1950.

Respectfully submitted,
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